



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Thursday, the Twenty Eighth day of October Two Thousand Twenty One

PRESENT

The Hon`ble Mr Justice P. N. PRAKASH

and

The Hon`ble Ms Justice R.N. MANJULA

CRIMINAL MISCELLANEOUS PETITION No.9311 of 2021

IN CRL.A.No.173 of 2018

RAMACHANDRAN

[PETITIONER/APPELLANT/ACCUSED]

Vs

STATE REP.BY
THE INSPECTOR OF POLICE,
WEST CHENGAM CIRCLE POLICE STATION,
THIRUVANNAMALAI DISTRICT.
CR.NO.136 OF 2004.

[RESPONDENT/COMPLAINANT]

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to

(i) Allow the petition Under Section 391 Cr.P.C. and permit the petitioner to Cross Examine the PW-4, PW-9 and PW-19 in the above case to secure the ends of justice.

Order : This petition coming on for orders upon perusing the petition and the filed in support thereof and upon hearing the arguments of M/S. R.SANKARASUBBU, Advocate for the petitioner, and of MR.M.BABU MUTHU MEERAN, Additional Public Prosecutor on behalf of the Respondent, the court made the following order:-

ORDER

P.N.PRAKASH, J.

Before advertng to the rival submissions, it may be necessary to state the minimum facts obtaining in this case.

2. The appellant/accused is the petitioner herein. It is the case of the prosecution that due to previous enmity, on 21.03.2004, the petitioner hacked to death three persons, while they were sleeping in their house; thereafter, the petitioner absconded and was arrested by the police only on 18.01.2005; on these allegations, the



petitioner faced a prosecution in S.C.No.192 of 2007 before the Court of Session, Tiruvannamalai, for the offences under Section 302 IPC (3 counts).

3. The petitioner was granted bail by the Court of Session on 15.02.2008 and he engaged M/s.V.K.Baskaran and V.Balu, Advocates of his choice to defend him in the trial. The prosecution examined 19 witnesses. No witness was examined from the side of the petitioner.

4. The trial Court, by judgment and order dated 14.07.2017, in S.C.No.192 of 2007, convicted and sentenced the petitioner to imprisonment for life. Challenging the said conviction and sentence, the petitioner preferred Crl.A.No.173 of 2018 on 18.01.2018 in this Court.

5. The Registry made ready the typed set of papers and listed the appeal for final disposal in August 2021. When the said appeal was taken up for final hearing, Mr.R.Sankarasubbu, learned counsel for the petitioner filed the present petition for additional evidence under Section 391 Cr.P.C. on 07.09.2021. When we told the learned counsel that when the appeal is ready for hearing, we could as well take up the appeal and during the course of the arguments, if we find that additional evidence is required in the case, in the interests of justice, the same can be taken then. For this, Mr.Sankarasubbu placed strong reliance on the order of the Supreme Court in *Asim @ Munmun @ Asif Abdulkarim Solanki Vs. The State of Gujarat (2020 SCC OnLine SC 1098)*. We perused the said order, wherein it is held as under :

"In fact, we are of the opinion that it is desirable that an application filed under Section 391 should be heard immediately after it is filed without waiting for the appeal to be finally heard."

6. A reading of the above passage shows that the Supreme Court has not stated that as a matter of thumb rule in every case, the additional evidence petition should be first taken up and disposed of, before taking up the appeal. This is because, the Supreme Court knows that if the law is so laid, no criminal appeal in the High Courts would ever see the end of the tunnel and if the prosecution or the accused find that a particular Bench is very inconvenient, they would resort to filing of an application under Section 391 Cr.P.C. for additional evidence and keep the appeal pending, till the roster changes. That is why, the Supreme Court has very carefully used the expression "it is desirable". However, in deference to the above observation of the Supreme Court, we agreed to take up the present petition for additional evidence and examine the merits therein.

7. Mr.Sankarasubbu placed reliance on the following judgments in support of his contention that additional evidence is necessary in this case:

- i. *Zahira Habibulla H.Sheikh and another Vs. State of Gujarat and others [2004 SCC (Cri) 999]*



ii. Mohd. Hussain @ Julfikar Ali Vs. State (Govt. of NCT of Delhi)
[(2012)2 SCC 584]

iii. V.N. Patil Vs. K. Niranjan Kumar and others [(2021)3 SCC 661]

iv. Somesh Chaurasia Vs. State of M.P. and another (2021 SCC OnLine SC 480)

8. The 1st case relates to the "Best Bakery Case", in which the Supreme Court transferred the trial from the State of Gujarat to the State of Maharashtra and in that context, the Supreme Court has expatiated on the amplitude of the power under Section 391 Cr.P.C.

9. As regards the 2nd case, on facts, the Supreme Court gave the following findings and thereafter, set aside the conviction and sentence of the accused therein :

"... The record reveals that the evidences of 56 witnesses, out of the 65 witnesses, examined by the prosecution in support of the indictment, including the eye witnesses and the Investigating Officer, were recorded by the Trial Court without providing a counsel to the appellant. The record also reveals that none of the 56 witnesses were cross-examined by the accused/appellant. It is only thereafter, the wisdom appears to have dawned on the Trial Court to appoint a learned counsel on 04.12.2003 to defend the appellant."

10. In the 3rd case, the prosecution had filed a petition under Section 311 Cr.P.C. before the trial Court, which was allowed, but, the said order was set aside by the High Court, aggrieved by which, the father of the deceased in that case, approached the Supreme Court. In those facts, the Supreme Court set aside the order of the High Court and restored the order of the trial Court and permitted the examination of the witnesses sought by the prosecution.

11. Mr. Sankarasubbu placed strong reliance on the following observations of the Supreme Court in the 4th case :

"... India cannot have two parallel legal systems, 'one for the rich and the resourceful and those who wield political power and influence and the other for the small men without resources and capabilities to obtain justice or fight injustice.' The existence of a dual legal system will only chip away the legitimacy of the law."

12. Mr. Sankarasubbu submitted that the appellant in this case was unable to pay the batta of Rs.2,000/- that was ordered by the trial Court, he being poor and therefore, the present petition under Section 391 Cr.P.C., should be allowed. One can have no two opinions on the above observations of the Supreme Court, inasmuch as there cannot be two parallel legal systems in our Country. In our considered opinion, on the facts of the present case, the aforesaid findings relied upon by Mr. Sankarasubbu, may be of little avail.



13. As stated above, during trial, the petitioner was on bail throughout and he had engaged the services of a counsel of his choice viz., M/s.V.K.Baskaran and V.Balu, Advocates, to defend him. Additional evidence under Section 391 Cr.P.C. in a case can be taken, at the instance of the prosecution or the accused or by the Court itself *suo motu*.

14. It may be apposite to extract the following passage from the judgment of the Supreme Court in *Rajeswar Prasad Misra Vs. State of West Bengal and another* (AIR 1965 SC 1887) :

"... Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. ... "

" (emphasis supplied)

15. Normally, additional evidence would be taken by an appellate Court under Section 391 Cr.P.C., for bringing on record a piece of evidence, which was either unavailable during trial or though being available, was unknown to the parties. Of course, as pointed out by the Supreme Court in *Rajeswar Prasad Misra (supra)*, the paramount consideration should be, whether there would be failure of justice without it. This is so because, the key expression in Section 391 Cr.P.C. is, "if it thinks additional evidence to be necessary".

16. Now coming to the facts of this case, as stated above, the petitioner was on bail, during the trial. He had engaged the services of a counsel of his choice viz., M/s.V.K.Baskaran and V.Balu, Advocates, to defend him. He had the opportunity to cross-examine P.W.4, P.W.9 and P.W.19. But, perhaps for strategic reasons, his counsel did not cross-examine these witnesses, but, cross-examined the other witnesses. The adjudication papers called for from the trial Court shows that, while he was on bail, he absconded on 01.01.2009 and a Non-Bailable Warrant was issued against him. He surrendered before the trial Court and the Non-Bailable Warrant was recalled. He was not remanded to custody.



17. The prosecution examined 19 witnesses and the counsel for the petitioner has cross-examined P.W.1, P.W.2, P.W.3, P.W.5 (hostile), P.W.6, P.W.7, P.W.8, P.W.10 (hostile), P.W.13, P.W.14 and P.W.15. The petitioner was questioned under Section 313 Cr.P.C. on 25.01.2017 and thereafter, the matter was posted for defence evidence on 01.02.2017, 04.02.2017, 10.02.2017, 13.02.2017 and 15.02.2017. On 15.02.2017, the learned counsel for the petitioner filed a petition under Section 311 Cr.P.C. to recall P.W.4, P.W.9, P.W.11, P.W.12, P.W.16 to P.W.19, which was allowed by the trial Court and process was issued to these witnesses, for their appearance on 04.03.2017. On 04.03.2017, we find the following adjudication :

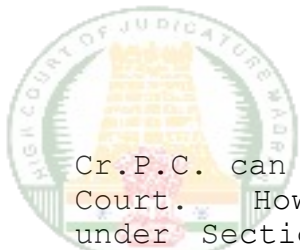
"04.03.2017 - Accused present. P.W.4, P.W.11, P.W.12, P.W.18, P.W.16, P.W.17 present. Defence counsel absent. Hence, issue summons to P.W.4, P.W.11, P.W.12, P.W.18, P.W.16 and P.W.17 on payment of batta to all witnesses on 20.03.2017."

18. From the above adjudication, it is clear that the trial Court had summoned these witnesses to the Court, without insisting upon the payment of batta and they appeared before the trial Court on 04.03.2017, but, the counsel did not appear and therefore, the Presiding Officer directed that fresh summons will be issued only on payment of batta. Thereafter, we find the following adjudications :

20.03.2017	Accused present. Batta not paid. Call on 21.04.2017.
21.04.2017	Accused present. Batta not paid. No representation today. If batta is not paid, 311 petition will be dismissed on that day. Call on 08.05.2017.
08.05.2017	Accused present. Batta not paid. 311 Cr.P.C. petition dismissed. For defence, call on 30.05.2017.
30.05.2017	For defence. Accused present. Adjourned to 27.06.2017.
27.06.2017	For defence 28.06.2017.
28.06.2017	For defence (NFA). Accused present. For defence 11.07.2017.
11.07.2017	For defence (NFA). Accused present. Defence side evidence closed. Heard. Judgment by 14.07.2017.

Thus, from the above, it is clear that the trial Court had given a very long rope to the petitioner and only thereafter, after hearing both sides, passed the judgment on 14.07.2017.

19. The present petition has been filed only to delay the conduct of the appeal, which is obvious from the fact that even in the petition, no sound reasons have been given for taking additional evidence of P.W.4, P.W.9 and P.W.19. In our view, Section 391 Cr.P.C. is not a substitute for Section 311 Cr.P.C. We are aware that, in a given case, the High Court under Section 391



Cr.P.C. can even recall a witness, who has been examined by the trial Court. However, if the appellate Court starts exercising powers under Section 391 Cr.P.C. at the drop of a hat, for recalling a witness for further cross-examination, it would go against the law laid down by the Supreme Court in *Vinod Kumar Vs. State of Punjab* [(2015) 3 SCC 220] and *State (NCT of Delhi) Vs. Shiv Kumar Yadav* [(2016) 2 SCC 402]. In *Vinod Kumar (supra)*, the Supreme Court has clearly stated that the witnesses should be cross-examined on the day they are examined in-chief and unnecessarily, they should not be recalled under Section 311 Cr.P.C. The trial Court record shows that Rajammal (P.W.9), who was 90 years old, when she gave evidence on 20.01.2015, is now being sought to be recalled in 2021.

In the result, we find no merits in this petition and the accordingly, this petition is dismissed.

-sd/-

28/10/2021

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE PRINCIPAL SESSIONS JUDGE,
THIRUVANNAMALAI.

2 THE SESSIONS CUM MAHILA FAST TRACK COURT,
THIRUVANNAMALAI.

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 THE INSPECTOR OF POLICE,
WEST CHENGAM CIRCLE POLICE STATION,
THIRUVANNAMALAI DISTRICT.

C.C. to M/S. R.SANKARASUBBU Advocate on payment of necessary charges

Order
in
CRL MP.9311/2021
in
CRL A.173/2018

Date :28/10/2021

From 7.2.2001 the Registry is issuing certified copies of the BAIL/Anti.BAIL Orders in this format